

Improving regulatory outcomes for legal services

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Victorian Legal Services
BOARD + COMMISSIONER

- Good morning and thank you to the Professional Standards Authority for the opportunity to speak to you today.
- My name is Fiona McLeay, and I am the current Victorian Legal Services Commissioner and CEO of the Victorian Legal Services Board.

The VLSB+C's role



2018-04-11

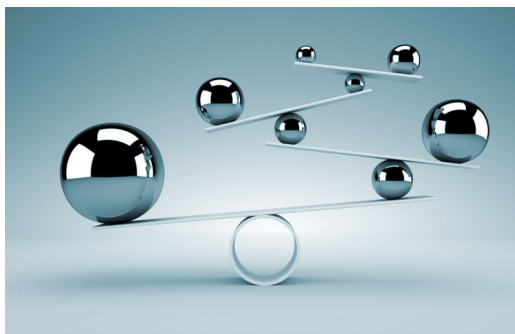
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- As some of you may know, the Victorian Legal Services Board and the Victorian Legal Services Commissioner are the two main independent statutory entities responsible for regulating Victoria's legal profession. I am both Commissioner (akin to Ombudsman) and the Board CEO.
- Although we are separate statutory entities, the Board and Commissioner operate and promote ourselves as a single regulator, known as the Victorian Legal Services Board and Commissioner, or VLSB+C.
- Collectively, we oversee around 23,000 solicitors and barristers in Victoria.
- We are also the sole regulator and the designated local regulatory authority under the Legal Profession Uniform Law, in which we participate alongside New South Wales and soon WA.
- Any regulatory powers exercised by professional associations in relation to the Victorian legal profession are done on my delegation. Current delegations are to VicBar to investigate complaints against barristers and to issue barrister practising certificates, and to the LIV to oversee continuing professional development for lawyers. LIV does not issue practising certificate, assess suitability, investigate complaints or otherwise regulate conduct of solicitors. This has been the case since 1 July 2015.

- The Board and Commissioner each have specific regulatory functions. As Commissioner, I manage consumer complaints, resolve client-lawyer disputes, investigate and prosecute breaches of the Uniform Law and rules, and have an educative role both for lawyers and the public.
- The Board administers other key chapters of the Uniform Law. These include unqualified practice prosecutions, applications for strike off, maintenance of the register of lawyers, administration of the trust account framework, interventions in failing law practices and management of statutory trust funds.
- Under delegation from the Board, as Commissioner I also grant and renew practising certificates, including suitability assessments and vary, suspend or cancel practising certificates. I can investigate the management of trust accounts and determine consumer claims for compensation from the Fidelity Fund where a lawyer has misused trust funds.
- Thus, an independent regulator..

Risk and evidence-based regulation at the VLSB+C



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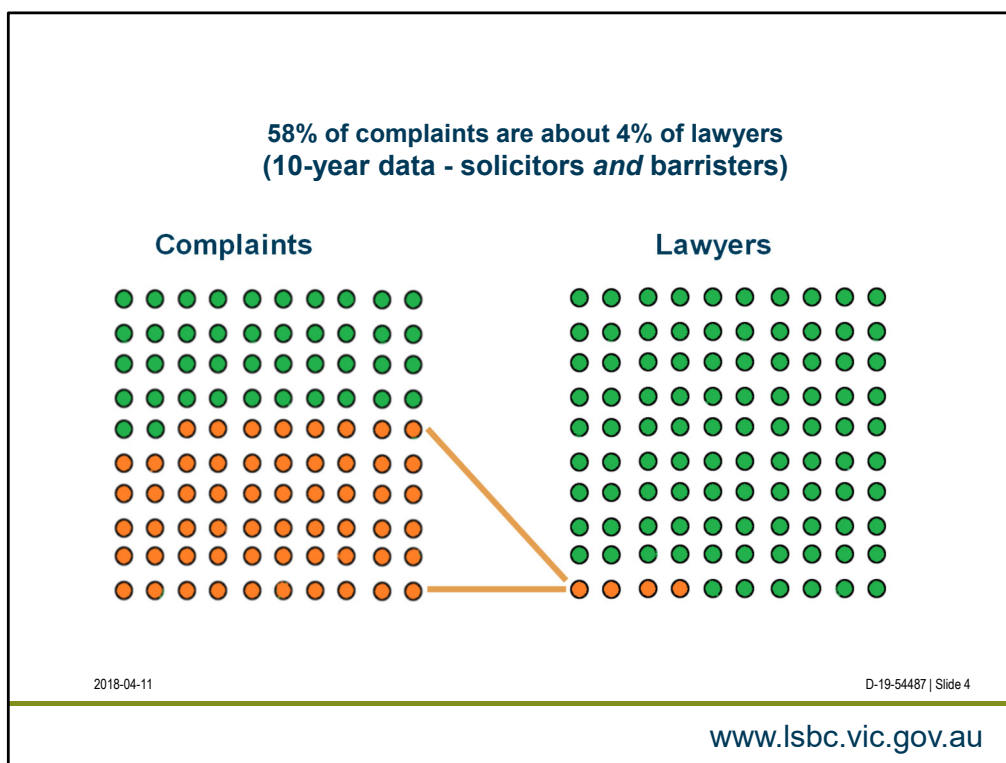
- Like most regulators, the VLSB+C has a keen interest in ensuring that we deploy our resources efficiently and effectively, to achieve the best regulatory outcomes for the profession and consumers of legal services.
- We have a public Regulatory Approach Statement that outlines a number of principles that inform the way we set regulatory priorities, make resource allocation decisions and apply the range of regulatory tools at our disposal.
- Two of those principles involve adopting a **risk-based** and **evidence-based** approach to the task of regulation.
- In practice, this involves:
 - targeting our resources to the **areas of greatest potential harm in the profession**, and
 - making decisions based on the **best available data and intelligence**.
- I have been asked specifically to talk today about the second of these topics – in particular how we use data and intelligence to assist us in our regulatory task. Using complaints data about lawyers to improve regulatory outcomes for consumers and lawyers

Melbourne University data analysis project

- A good example of our efforts to build our intelligence in relation to the Victorian legal profession is the three-year project we undertook in 2017 and 2018 with Dr Marie Bismark from the University of Melbourne, to better understand the profile of lawyers who are at higher risk of coming to our attention, either for conduct or service issues.
- The project involved reviewing and analysing 10 years of our complaints data from 2005 to 2015, plus undertaking a detailed review of 32 “highly complaint prone” lawyers whose disciplinary matters had proceeded to the Victorian Civil and Administrative Tribunal.

Why did we do this project?

- Our hypothesis was that if we could identify the characteristics of “complaint prone lawyers” and more importantly, what factors contributed to these characteristics developing, then we might be able to intervene to prevent them getting into trouble or to curtail or correct them before they cause serious harm for consumers of legal services, or difficulties for themselves.
- The findings of the project confirmed our anecdotal evidence.



Key findings:

- The key findings from the project (based on an analysis of VLSB+C data) were that:
 1. Victoria’s legal workforce is changing. The workforce is growing in size, with more female practitioners, lawyers continuing to work later in life, with fewer sole practitioners and also fewer regional practitioners.
 2. The following traits contribute to an increased risk of a complaint:
 - a. Gender (men);
 - b. Age (older >50);
 - c. Having a practising certificate with trust authority;
 - d. Being a sole practitioner;
 - e. Type of practice
 - f. Area of law practiced; and
 - g. Location of practice.
 3. The following subjective practitioner traits were also identified as being consistent with practitioners who attracted 20 or more complaints:
 - a. “Agreeableness” (not agreeable);
 - b. “Personality” (including low empathy, high antagonism, poor

- communication);
 - c. “External Influences” (health, personal stressors); and
 - d. “Business Practice Problems” (including unorthodox, ill-equipped generalist; misplaced loyalty).
1. Incorporated Legal Practices are more likely to attract complaints.
 2. **4% of lawyers account for 58% of complaints (see diagram).**
 3. 100 lawyers have 20 or more complaints.
 4. The amount of data relating to paid fidelity fund claims was found to be too small to conduct “hot-spot, deep-dive” analysis. However, based on the data available, the following deductions were made in relation to practitioner traits that were more common in relation to paid claims:
 - a. Gender (men);
 - b. Age (older);
 - c. Area of law practiced; and
 - d. Strong commonality between complaints and paid fidelity fund claims.

Other interesting findings:

- Another interesting finding from the project was that, while fellow practitioners are often well placed to observe misconduct, fewer than 10% of complaints came to the VLSB+C from peers.
- Those complaints that come from peers (and result in a commissioner-initiated complaint) are far more likely to result in a misconduct finding than those received from clients.
- We’ve got some work to do to encourage profession to flag their concerns with us.

Limitations of the data:

- The data is from 2005-2015, and will need to be refreshed in the near future, to reflect workforce developments.
- We only analysed information that lawyers are required to give the Board, for example, as part of their practising certificate renewal.
- There are key pieces of information missing, including what area of law a lawyer works in, and how many hours a week they work. We have now added these as optional questions for practitioners to answer as part of the current practising certificate renewal cycle.

What are we doing differently as a result?



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What are we doing differently as a result of the Melbourne University project?

- The development of a tool to assist us to identify who may be most at risk of a complaint. The **PRONE** score gives a **Predicted Risk Of New Event**.
- Points are allocated based on identified high risk traits and characteristics (type of practice, trust account authority, number of complaints, age and gender). A low score = a low risk.
- Depending on their score, lawyers will attract different levels of **proactive** scrutiny.
- We have been using it in our oversight of trust account management. It assists us to determine how much of our resources should be allocated to assessing those with a high PRONE score, compared with low score practitioners.
- For example, we conducted a risk assessment (short form, ½ day visit) of everyone with a PRONE score of over 97/100, to examine their **trust accounts**. Previously, our approach to trust account investigations involved visiting every law practice in Victoria once every 5 years to undertake full (often week-long) investigation. This approach has been replaced with an approach informed by what we know about a practitioner's risk profile, based on our data and research.

- A high PRONE score also informs decisions about where and when to undertake proactive **compliance auditing**.
- In all cases, if a complaint is made or other information received about a practitioner, the VLSB+C will respond in an appropriate and proportionate way, taking into account the practitioner's history. This may include a reactive trust investigation.

Other initiatives

- Other research and evidence-gathering initiatives that we are progressing include establishing a **Consumer Panel**, comprising research experts and consumer representatives, to assist the VLSB+C in undertaking research to understand the consumer experience of legal services (including consumers who don't access legal services) and improving both access to justice and new market opportunities for legal practitioners. To help us access the information and data that we're not hearing through our current complaints.
- We're also working increasingly closely with the LIV and VicBar on their work to strengthen skills and networks and identify and support struggling lawyers.
- New Principal Practising Certificate requirements
- Succession and Contingency Planning Policy

What are the alternatives to a large scale research project?



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What are the barriers?

- Undertaking research to inform data and intelligence no doubt involves:
 - Financial cost
 - Time cost
 - Redirection of resources
- However, the benefits are clear. Understanding the sector you regulate is critical to being an effective and efficient regulator.

What alternatives are there to such a large scale project?

- Education/courses on risk and evidence-based regulation (e.g. Malcolm Sparrow).
- Developing communities of practice with other organisations, to share the financial load of undertaking research.
- Reflecting on publicly available data and literature on risk and evidence-based regulation. These topics have been widely written about throughout Australia by regulatory agencies and red tape commissioners (e.g. the Victorian Commissioner for Better Regulation).

- Partner with and learn from others e.g. APHRA.

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